No. 01-445

In The

Supreme Court of the United States

THE WYANDOTTE NATION,
a federally recognized tribe,

Petitioner,

vs.

SAC AND FOX NATION OF MISSOURI, IOWA TRIBE OF KANSAS AND NEBRASKA, PRAIRIE BAND OF POTAWATOMI INDIANS, KICKAPOO TRIBE OF INDIANS AND BILL GRAVES, GOVERNOR OF THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO RESPONDENTS' OPPOSITION BRIEFS

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REPLY TO RESPONDENTS' OPPOSITION BRIEFS

Two briefs have been filed in opposition to the Petition filed by the Wyandotte Nation. One was filed by the plaintiffs/appellants below who collectively refer to themselves as the "Kansas Parties." See "Brief in Opposition for Respondents" at 1, n. 2. The other brief was filed by the United States apparently[1] for the Secretary of Interior, the defendant/appellee below. "Brief for the Federal Respondent in Opposition."

The Kansas Parties assert that Section 2719(a)(1) of the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) authorizes federal appellate courts[2] to determine *ad hoc* without deference to the Secretary of the Interior whether Indian land is a "reservation" solely for the purpose of IGRA gaming. Thus, the Secretary of the Interior will determine whether the Wyandotte's land in Kansas City is an Indian reservation for all federal purposes, but for IGRA gaming which determination will be made by an appellate court.

The United States notes that subsequent to promulgation of the opinion below a new law was enacted "which purports to 'clarif[y]' the Secretary's authority to determine reservation status for purposes of IGRA" and "appears to confirm the Secretary's authority to determine the reservation status of the Huron Cemetery." U.S.

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[1] The "Federal Respondent" does not identify a specific party represented.

[2] The trial court specifically refrained from determining whether the Huron Cemetery "is reservation land" under IGRA. See Pet. App. 48.

Br. at 8-9. However, the United States argues this clarifying law – which is entirely consistent with the Secretary's arguments below – should not be applied to the Wyandotte.

ARGUMENT

1. In adopting IGRA, Congress had no intention to divest the Secretary of the Interior of his authority over Indian lands.

The Secretary of the Interior has been legislatively assigned to regulate United States relations with Indian tribes, most particularly with respect to Indian lands. See 25 U.S.C. §§ 2, 9, 465, 467; see also 9 Stat. 395. Relying on IGRA, the Kansas Parties and the United States attempt to justify bypassing the Secretary to apply a different standard for determining reservation status than that traditionally applied by Congress, the Executive and the Courts. Nothing within the language of IGRA remotely suggests such a radical change in federal Indian policy was intended by Congress when it adopted IGRA.

The United States proposes that:

> without deference to the Secretary's views, [the court of appeals] concluded that Congress used the term "reservation" in IGRA to refer only to "land set aside by the federal government for the occupation of tribal members." . . . The court found support for that construction in IGRA's use of the phrase "*the* reservation of the Indian tribe," . . . which suggested to the court "that Congress envisioned that each tribe would

have only one reservation for gaming purposes." U.S. Br. at 5.

The court of appeals decision and these arguments are inconsistent with Section 2719 of IGRA. The Secretary's responsibility over Indian land decisions is clear from the plain language of Section 2719. For example, Section 2719 generally prohibits gaming on property "acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). Congress may require the Secretary to take land in trust for a tribe. However, absent such Congressional direction, the decision to take Indian land into trust is a discretionary act by the Secretary. See 25 U.S.C. § 465; 25 C.F.R. § 151. In deciding whether to take land into trust for the benefit of a tribe, the Secretary is required to determine whether the trust acquisition will "[f]acilitate tribal self-determination, economic development, Indian housing, land consolidation or natural resource protection," and whether "the acquisition provides meaningful benefits to the Tribe that outweigh any demonstrable harm to the local community." 25 C.F.R. § 151.14(a)(1)-(2). If a tribe anticipates using trust property for gaming purposes, the Secretary will have to evaluate whether that property is eligible for gaming under IGRA. The Secretary's decision regarding the "reservation" status of adjoining property would, therefore, be a critical part of any decision to take the land into trust. If courts were to review such a decision *de novo*, they would undermine the very premise upon which the acquisition decision was made. In Section 2719, Congress gave the Secretary explicit authority over other "exceptions" to the general bar on gaming on after-acquired property. Under Section 2719(b)(1)(A), for

instance, the Secretary may permit gaming on such property if it would be in the best interest of the tribe, not detrimental to the surrounding community, and if the state concurs. See also 65 Fed. Reg. 55471 (proposed Interior regulations governing gaming on such property). In addition, Section 2719(b)(1)(B)(iii) permits tribes to game on property that is taken into trust as part of "the restoration of lands for an Indian tribe that is restored to federal recognition." A determination of that nature – evaluating whether a tribe has been "restored" to federal recognition – is an issue squarely within the Secretary's responsibilities. The Secretary is also required to approve tribal-State compacts – approval that would not be appropriate if the compact allowed gaming on property that was not eligible for gaming under IGRA. See 25 U.S.C. § 2710(d)(8).

The Secretary therefore has jurisdiction over the decision to take land into trust, which triggers inquiries under section 2719, and jurisdiction over a critical exception to the general bar set out in Section 2719(a). The Secretary of the Interior has 150 years of experience – both in making legal interpretations regarding and in participating in the creation and modification of reservations. The Secretary will necessarily have to make determinations under Section 2719(a) prior to decisions to take land into trust, as well as prior to decisions regarding whether to approve a tribal-State compact. The Secretary's determinations regarding the "reservation" status of land in any other circumstance will have substantial practical implications for property owned by or held for the benefit of a tribe. All of these considerations indicate

substantial practical experience by the Secretary regarding the question presented here and demonstrate that Congress at least implicitly understood that the Secretary would be responsible for the resolution of this question in a variety of circumstances. Such an understanding requires that the courts defer to the Secretary's determinations regarding whether property is a "reservation" under section 2719(a)(1).

2. Congress has legislatively clarified that the Secretary of the Interior is the proper authority for determining what land constitutes reservation for purposes of IGRA.

Not only is it clear that Congress implicitly understood the Secretary's role in determining the reservation status of land under IGRA, but Congress has subsequently made explicit what was implicit by enacting the "clarifying" legislation noted by the United States. U.S. Br. at 8. Section 134 of Public Law 107-63 provides:

> The authority to determine whether a specific area of land is a "reservation" for purposes of section 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988: *Provided,* That nothing in this section shall be construed to permit gaming under the Indian Gaming Regulatory Act on the lands described in section 123 of Public Law 106-291 or any lands contiguous to such lands that have not been taken into trust by the Secretary of the Interior.

Although admitting that "Section 134 thus appears to confirm the Secretary's authority to determine the reservation status of the Huron Cemetery," the United States argues that "the particular circumstances of this case does not present a question that warrants the Court's review." U.S. Br. at 8-9. Thus, the law is to be applied one way for the Wyandotte and another way for all others. This is patent unequal treatment under the law and, like all cases of unequal protection of the laws, it undermines faith in the judicial system. Under the United States' argument, courts do not have to follow the law when it does not like the circumstances. The role of the courts is to review laws that specifically allow disparate treatment under certain circumstances, not to treat litigants differently when the law does not purport to allow distinctions.

If, as the Court's initial opinion recognized, the term "reservation" is ambiguous in IGRA, the Secretary is entitled to deference in determining what land is a "reservation" under that statute. As long as the Secretary's determination is a reasonable one, Courts should defer to the decision. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 & n. 11 (1984).

In rejecting the Secretary's decision that the Huron Cemetery was a reservation, the court of appeals construed "reservation" as used in IGRA [§ 2719(a)(1)] to refer to just those tracts of Indian lands where the tribe's membership lives. Pet. App. at 35. This limitation is contrary to at least 150 years of practice and ignores the fact that Indian lands long considered reservations are broadly diverse. This diversity, by itself, at least makes it reasonable to believe that Congress did not intend "the reservation" to mean only the tribe's primary residential

area. In fact, the United States vigorously so contended in its petition for rehearing filed below:

> As the Department was well aware in reaching its decision in this case, tribes throughout the nation own "reservation" lands that are not only non-contiguous, but on which no members of the tribe reside. [footnote: Setting aside for the moment those reservations that are made up of "checkerboarded" sections, several examples come to mind. The Pit River Tribe in California, for instance, has jurisdiction over several separate rancherias, which are considered "reservations" under federal law and subject to the full range of tribal rights and responsibilities associated with reservations. Along with at least six other properties, no one of which could easily be deemed the tribe's "core" reservation, the tribe has jurisdiction over the Likely Rancheria in Burney, CA. This piece of the tribe's reservation is a 1.32 acre cemetery. See http://istsocrates.berkeley.edu/"espm5Oac/CAIndians.pdf. At least six other California tribes have non-contiguous parcels, all of which are considered the tribe's "reservation."
>
> The Capitan Grande Band of Diegueno Mission Indians hold nearly 16,000 acres of reservation land on which no tribal members live because the property is now located in a watershed draining to a reservoir used for drinking water. The Red Lake Band in Minnesota owns, in addition to the large reservation around Red Lake, a substantial parcel of reservation land in the Northwest Angle. The Mille Lacs Band of Minnesota owns widely scattered parcels of land in central Minnesota.

> Finally, as with the Wyandotte, who continued to exist between 1956 and 1978, only because the Huron Cemetery was not sold, see US/App. 6C, 6F, the existence of a single tribal cemetery as reservation land was critical to two Washington State tribes seeking to reorganize under the Indian Reorganization Act. Pursuant to 25 U.S.C. § 467, a group of Indians may reorganize under the IRA only if they own a "reservation." Even though the only land held by the Sauk Suiattles and Upper Skagits was a small cemetery, the Secretary approved the tribe's reorganization in the mid-1970s.]
>
> It would be difficult, if not impossible in some cases, to draw a principled distinction between "reservation" land entitled to be considered a reservation under 25 U.S.C. § 2719(a)(1), and "reservation" land that was excluded from that definition. Cf. *Oklahoma State Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991) (noting complexities in evaluating status of Indian lands). The Department therefore chose to apply the traditional meaning of 'reservation.'

Petition for Panel Rehearing for the Federal Appellees, pp. 11-12 (filed May 14, 2001).

The court of appeals refused to defer to the authority of the Secretary and thus never considered whether the Secretary's reasoning on the reservation of the Huron Cemetery was reasonable. By not reviewing the Secretary's decision, the court of appeals implies that the Secretary's decision would have withstood such a review,

i.e., the Secretary's decision was reasonable and entitled to deference.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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